IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-CV-00329-TCK-SAJ
	)	
TYSON FOODS, INC. et al.,	)	
	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF MOTION OF DEFENDANT SIMMONS FOODS, INC. TO COMPEL DISCOVERY FROM PLAINTIFF

John R. Elrod, AR Bar Number 71026
Vicki Bronson, OK Bar Number 20574
CONNER & WINTERS, LLP
211 East Dickson Street
Fayetteville, AR 72701
(479) 582-5711
(479) 587-1426

D. Richard Funk, OK Bar No. 13070
Bruce W. Freeman, OK Bar No. 10812
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, OK 74172-0148
(918) 586-5711
(918) 586-8547

Attorneys for Defendant Simmons Foods, Inc.

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Defendant Simmons Foods, Inc. ("Simmons") submits this reply in further support of its pending motion to compel discovery from Plaintiff.

Introduction

Reading Simmons' actual discovery requests and motion to compel on the one hand, and the State's response on the other hand, reveals a striking difference between the parties' approaches to the litigation. Plaintiff has sued Simmons and others alleging waters and other elements of the Illinois River Watershed have been degraded by the land application of poultry litter. Plaintiff has not alleged it *worries* Defendants have degraded the Watershed, or Plaintiff *suspects* Defendants have degraded the Watershed, or after further studies Plaintiff *may conclude* Defendants have degraded the Watershed. Plaintiff alleges, presumably based on some evidence, that Defendants have *actually degraded* the Watershed through the land application of poultry litter.

The State has made representations to the press that the amount of poultry-generated phosphorus flowing into the Illinois River/Lake Tenkiller watershed alone is equal to the phosphorus that would be generated "by an additional 10.7 million people living in the watershed without waste-water treatment" and that "Edmondson's office calculated that 58 percent of the phosphorus flowing into Lake Tenkiller comes from runoff, and 95 percent of that phosphorus comes from poultry litter."[1] Given these representations in the press being communicated to the case's potential jurors, and to discover just what Plaintiff is contending in this lawsuit, Simmons asked some simple questions.

The first questions asked the State how much phosphorus and nitrogen loading *the State says* occurred in Lake Tenkiller in a particular time period caused by the land

[1] See press report attached to Simmons' moving papers.

application of poultry litter. Of that amount, Simmons asked, how much *does the State say* came from growers under contract with Simmons. And, Simmons asked, tell us how the State knows. Finally, Simmons asked, tell us anyone who *the State says* was harmed by contact with the water. The one document request was for whatever materials the State relied on for the answers. As the Court knows, the State declined to answer any of the questions or produce any documents in response to the requests until after Simmons filed the motion to compel.

THE PARTIES HAVE CONFERRED AND THE STATE HAS AGREED TO SUBMIT SOME AMENDED INTERROGATORY ANSWERS, BUT THE PARTIES ARE STILL APART ON THE BASIC QUESTION OF WHETHER THE STATE'S FACTUAL CONTENTIONS ARE SECRET OPINION WORK PRODUCT

Simmons wrote representatives of the State raising the questions about which it eventually moved to compel, inviting the State to fix its deficient answers and warning that a failure to respond would result in a motion to compel being filed. John Elrod's July 7 letter to the State's counsel is Exhibit 1 hereto. No one at the State bothered to get back to Simmons until after the motion to compel was actually filed, via Mr. Nance's July 14 letter to Mr. Elrod. It takes at least two to confer.

Mr. Nance's July 14 letter purported to answer one of the interrogatories which the State had refused to answer based on lengthy objections, saying in answer to interrogatory 5 the State knows of *no one* who has been harmed by contact with the water. Similarly, the State's response brief stated it *does not know* the answer to interrogatory 3 about how much P and N loading the State contends came from growers under contract with Simmons. In conferences with the State since Simmons' motion was filed, the State has agreed to supplement its interrogatory answers to state that it does not know the answers to Interrogatories 3 and 5. So, Simmons is willing to drop the motion

to compel with respect to those interrogatories. The State, however, maintains its hard line with respect to the other discovery requests.

Interrogatories

Interrogatory 1 asks Plaintiff a factual question: "For each calendar year, 1985 through 2005, state the total P loading for that year to Lake Tenkiller resulting from the land application of poultry litter in the Illinois River Watershed." Interrogatory 2 asks the same question for N loading. The appropriate answer is either (i) a particular amount for each year Plaintiff endorses or (ii) an admission Plaintiff does not know. Interrogatory 4 asks: "For each of your answers to Interrogatory Numbers One and Two, tell us how you know. Be complete." The State has also totally failed to answer that one.

Request for Production

Simmons' only request for production of documents asked for copies of documents that support the State's answers to the first four interrogatories about P and N loading. The only discovery request which might implicate work product is the document request, which does actually ask for tangible things.

THE STATE CANNOT DECIDE WHETHER THE ANSWERS ARE PUBLIC OR SECRET

The State relies on two contradictory theories. The first theory is anything the State knows about the factual support for its allegations and theories must stay secret "until the decision is made to designate the experts as testifying experts pursuant to Rule 26(a)(2)."[2] The State argues the information requested is attorney opinion work product "because it reflects the strategy of the State's counsel,"[3] and any documents they rely on are deep secrets until expert report time. The second and contradictory theory is the

[2] The State's response papers, at p. 3.
[3] The State's Response, at p. 3.

information is publicly available so a listing of websites where various public studies can be printed (or a listing of hard copy studies) answers the questions and document request.

IF THE INFORMATION IS SECRET, WHY IS THE STATE REFERRING SIMMONS TO PUBLICLY-AVAILABLE MATERIALS FOR THE ANSWER?

Rather than receiving answers to the interrogatories or a single page in new document production, Simmons received a June 30 letter from Mr. Nance with indices of websites and documents which were supposed to be responsive to the interrogatories and document request.[4] The State argues at pp. 6-8 of its response papers that by producing an index of publicly available studies, it has answered the interrogatories[5] and responded to the document request.

Simmons has wasted substantial time digging through the various websites listed by the State to see whether they contain some definitive answer. It turns out the materials cited by the State as potentially answering the interrogatories disclose only that a variety of figures for and theories about water quality are floating around. What Simmons was asking, and what the State has refused to answer, is *what figures, if any, does the State endorse* for purposes of this lawsuit it has brought. This is the kind of basic information which will allow Simmons to proceed with preparation of its defensive case.

THE INFORMATION REQUESTED IS NOT SECRET OPINION WORK PRODUCT

After arguing the information is publicly available and Simmons can glean the State's position by choosing between various studies to guess what the State contends and why, the State argues that disclosing the factual information will reveal trial

[4] Mr. Nance's letter was Exhibit 4 to Simmons' moving papers.
[5] Under FRCP 33(d), which lets a party produce its own specific business records which contain the answer to a question, equally convenient to both parties.

counsel's secret thought processes and the work of secret consulting experts. This perception seems to account for some the ships-passing-in-the-night aspect of the controversy. Simmons' interrogatories did not ask Plaintiff to identify each expert, nontestifying consultant or lawyer with an opinion and what they think about the issues. The interrogatories did not ask the State about its lawyers' secret trial strategies or what they intend to prove.

The interrogatories just asked Plaintiff *how much* of certain chemicals *the State contends* came to a particular place due to the land application of poultry litter and how it knows. And, if there is an answer, then the document request asks for a copy of what the State relies on. Plaintiff has an amount or it does not. If the answers, like the recent responses, are really "we don't know right now, no matter what we've been telling the press," then the State can tell us. If there is an answer, then the parties the State has sued under the Federal Rules of Civil Procedure are entitled to get that information without waiting for newspaper delivery.

Simmons' opening papers established some of the basic ground rules as set out in the Federal Rules of Civil Procedure. Facts are not shielded by privilege or work product and are discoverable by deposition question and written interrogatory.[6] A party's contentions and the basis for its position are also discoverable.[7] Because of the language of Rule 26 about tangible things, some courts have questioned whether a work product objection even makes sense in the context of interrogatories.[8] By suing Simmons and the other Defendants and making public statements about the chemical levels, the State has

[6] Simmons' opening papers, pp. 11-13.
[7] Simmons' opening papers, pp. 13-14.
[8] Simmons' opening papers, pp. 12-13.

waived any protection of its position on these basic factual topics.[9] Simmons has substantial need of the information requested (that is, what does the *State say the facts are and why*) and cannot obtain substantially equivalent information without undue hardship.[10]

The legal authority presented by the State does not really address the legal issues involved in Simmons' requests or the State's responses. The State cites cases saying you cannot discover which small group of documents was picked by counsel as the key papers for witness preparation,[11] or that it is inappropriate to depose in-house counsel about what documents she keeps in her files when other company representatives can testify about the documents and they will be produced.[12] Some cases deal with people trying to get their hands on attorney work product papers--witness interviews, notes, drafts, opinions of trial counsel through deposition and the like. Simmons is not requesting the lawyers' notes, or their opinions about various aspects of the case, or what they told their client representatives about their trial strategy or their chances of success. We are requesting answers about the facts as perceived by the State, no matter what the source of those facts. And then, in the single document request, we are asking for production of what the State relies on for its conclusions. We are not asking the State to produce any analyses which were prepared and then rejected because those analyses failed to help the State's case. What we have here is a failure to communicate.

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[9] Simmons' opening papers, p. 15. *Sinclair Oil Corp. v. Texaco, Inc*., 208 FRD 329, 335 (N.D. Okla. 2002) laid out three factors: (i) whether the assertion of the privilege is the result of some affirmative act, such as filing suit or asserting an affirmative defense; (ii) whether the asserting party, through the affirmative act, put the protected information at issue by making it relevant to the case; or (iii) if the privilege was applied, would it deny the opposing party access to information that was vital to the opposing party's defense.

[10] Simmons' opening papers, p. 16.

[11] *Sporck v. Peil*, 759 F. 2d (3rd Cir. 1985).

[12] *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1328-29 (8th Cir. 1987).

The State relies on *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*,[13] *Almaguer v. Chicago, R.I. & Pac. RR.*[14] and *Martin v. Montfort, Inc.*[15] for the idea that Simmons can have no substantial need for answers because Simmons could conduct its own investigation or testing. This authority is an example of how the State is missing (or avoiding) the point and inappropriately trying to protect its factual information via a work product theory. *Goodyear* and *Almaguer* involved the classic "insurer, give us your witness statements" request which the court denied. *Martin* denied the government copies of time and motion studies performed by a corporate defendant which the defendant swore it was not going to use in any way in the lawsuit, which no expert would rely upon and about which no one would testify. Simmons is not asking the State to tell us its contentions and the basis of its contentions because we are unable to independently test the water or the allegations. We are trying to find out in detail *what the allegations are and what they are based upon*. That is the ball the State is trying to hide, for whatever reason.

The State spends much of its brief arguing the details of the State's allegations and what they are based on cannot be disclosed because they are "intertwined with other aspects of the State's scientific proof" and "contains the imprint of its attorneys' mental impressions and theory of the case."[16] The State relies on *Shoemaker v. General Motors*[17] for the theory that tests show the attorneys' mental impressions and are exempt from discovery. Simmons has not asked the State to tell us about every test they have performed, whether or not on lawyers' orders, or about tests they have abandoned. We

[13] 190 FRD 532, 539 (S.D. Ind. 1999).
[14] 55 FRD 147, 149 (D. Neb. 1972).
[15] 150 FRD 172, 174 (D. Colo. 1993).
[16] State's response papers, at p. 11.
[17] 154 FRD 235 (W.D. Mo. 1994).

have just asked what the State's contentions are, how it knows, and to produce what it is relying on for the conclusion. On further reflection, the State may not want to rely on *Shoemaker*. There, the plaintiff wanted to attend all the defendant's testing as it was being done to ensure honesty. The Court declined. However, in part of the decision not discussed by the State, the Court explained why:

> If the results of any of these tests are to be offered as evidence at trial, General Motors will provide plaintiffs, well in advance of trial, the opportunity to depose persons knowledgeable about the tests offered. The class of 'knowledgeable persons' shall include both testifying and non-testifying experts. Through this mechanism, plaintiffs may discover the nature of the test offered and the number of similar tests performed to reach a certain result. The Court must assume at this point that General Motors will provide full and accurate information about these tests when requested to do so. General Motors is certainly well aware of this Court's treatment of inadequate discovery.

154 FRD at 235.[18]

The area of actual dispute appears to be the State's argument that "raw data" can be opinion work product. The State cites *Baker v. General Motors Corp.*,[19] *Hollinger Int'l v. Hollinger, Inc.*,[20] and *O'Connor v. Boeing*.[21] *Baker* addressed attorney notes and summaries from a witness interview, finding noncontroversially that these were attorney opinion work product. *Hollinger* concluded drafts of an internal investigation report on company wrongdoing, with attorney notes and witness interview notes, was opinion work product. *O'Connor* refused to compel production of the witness interview notes of the attorney's investigator.

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[18] Oddly, the State also cites *AK Steel Corp. v. Sollac and Ugine*, 234 F. Supp. 2d 711, 714 (N.D. Ohio 2002) for the proposition that test data can reflect opinions and mental impressions of counsel, although that case specifically did not address the issue.
[19] 209 F.3d 1051 (8th Cir. 2000).
[20] 230 FRD 508 (N.D. Ill. 2005).
[21] 216 FRD 640 (C.D. Cal. 2003).

The State then spends several pages explaining how consulting experts are not normally subject to depositions and document production. The State cites *Employer's Reinsurance Corp. v. Clarendon National Ins. Co.*[22] This case concluded, as no great surprise, that the accidental production of a draft affidavit written by a nontestifying consultant should be returned and not used. *Moore USA, Inc. v. Standard Register Co.*,[23] ruled that a nontestifying expert's secret testing reports did not have to be produced to the other side unless and until his employer chose to rely upon them in the litigation.[24] Similarly, *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd.*[25] refused to allow all the other parties to a lawsuit with their own consulting experts to subpoena the report of a nontestifying expert hired jointly by two other parties.

Simmons agrees the opinions or recommendations of secret, never-intended-to-testify consulting experts is for most practical purposes immune from discovery. Most everyone in the case probably has some behind-the-scenes investigators or consultants giving the lawyers ideas or recommendations about what questions to ask, or how to incorporate technical information into the lawyers' work. Simmons is not asking to depose those nontestifying consultants or asking what they are telling the State's lawyers. None of the State's cases is particularly instructive because Simmons is not doing anything addressed by those cases. Simmons has not asked the State to identify its never-intended-to-testify consultants, or even the expert witnesses the State really knows it will eventually name but does not want to disclose yet. Simmons has not asked to depose

[22] 213 FRD 422 (D. Kan. 2003).
[23] 206 FRD 72 (W.D. N.Y. 2003).
[24] *Bank Brussels Lambert v. Chase Manhattan Bank*, 175 FRD 34 (S.D. N.Y. 1997) which the State quotes actually did force the deposition of a party's nontestifying consulting expert, but of course that sort of relief is not what Simmons is requesting at this stage of the case.
[25] 154 FRD 202 (N.D. Ind. 1993).

them at this time. Nor has Simmons asked for secret analyses the State has not relied upon for whatever tactical reason. Our requests are simple - tell us your position if you have one, tell us how you got there, and tell us what you rely on for it.

CONCLUSION

Simmons' opening papers set out the legal framework under the Federal Rules of Civil Procedure - factual contentions are not immune from discovery as work product. Nothing in the State's response papers changed that conclusion. Simmons asks that the Court compel answers to the interrogatories which are still unanswered and production of responsive, nonprivileged documents.

Respectfully submitted

/s/Bruce W. Freeman
John R. Elrod, AR Bar Number 71026
Vicki Bronson, OK Bar Number 20574
CONNER & WINTERS, LLP
211 East Dickson Street
Fayetteville, AR 72701
(479) 582-5711
(479) 587-1426

and

D. Richard Funk, OK Bar No. 13070
Bruce W. Freeman, OK Bar No. 10812
CONNER & WINTERS, LLP
4000 One Williams Center
Tulsa, OK 74172-0148
(918) 586-5711
(918) 586-8547

ATTORNEYS FOR DEFENDANT SIMMONS FOODS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2006, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Riggs Abney Neal Turpen
Orbison & Lewis
502 West 6th Street
Tulsa, OK 74119-1010
Counsel for Plaintiffs

Robert Allen Nance
Dorothy Sharon Gentry
Riggs Abney
5801 North Broadway, Suite 101
Oklahoma City, OK 73118
Counsel for Plaintiffs

Robert W. George
Michael R. Bond
Kutak Rock, LLP
The Three Sisters Building
214 West Dickson
Fayetteville, AR 72701
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

Mark D. Hopson
Timothy K. Webster
Jay T. Jorgensen
Sidley, Austin Brown & Wood, LLP
1501 K. Street, N.W.
Washington, D.C. 20005-1401
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

David Phillip Page
James Randall Miller
Louis Werner Bullock
Miller Keffer & Bullock
222 South Kenosha
Tulsa, OK 74120-2421
Counsel for Plaintiffs

W.A. Drew Edmondson
Attorney General
Kelly Hunter Burch
J. Trevor Hammons
Robert D. Singletary
Assistant Attorneys General
State of Oklahoma
2300 North Lincoln Blvd., Suite 112
Oklahoma City, OK 73105
Counsel for Plaintiffs

Elizabeth C. Ward
Frederick C. Baker
Motley Rice LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
Counsel for Plaintiffs

Patrick Ryan
Stephen Jantzen
Paula M. Buchwald
Ryan, Whaley & Coldiron
900 Robinson Renaissance
119 North Robinson
Oklahoma City, OK 73102
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

Gary Weeks
James W. Graves
Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702-3618
Counsel for George's, Inc. and George's Farms, Inc.

Randall Eugene Rose
George W. Owens
Owens Law Firm PC
234 West 13th Street
Tulsa, OK 74119-5038
Counsel for George's, Inc. and George's Farms, Inc.

Delmar R. Ehrich
Bruce Jones
Krisann Kleibacker Lee
Faegre & Benson
90 South 7th Street, Suite 2200
Minneapolis, MN 55402-3901
Counsel for Cargill, Inc. and Cargill Turkey Production, LLC

Robert P. Redeman
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC
P.O. Box 1710
Tulsa, OK 74101
Counsel for Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc.

Robert E. Sanders
Stephen Williams
Young, Williams, Henderson & Fusilier
P.O. Box 23059
Jackson, MS 39225-3059
Attorneys for Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc.

John H. Tucker
Colin H. Tucker
Theresa Noble Hill
Rhodes, Hieronymus, Jones, Tucker & Gable, P.L.L.C.
100 West Fifth Street, Suite 400
Tulsa, OK 74121-1100
Counsel for Cargill, Inc. and Cargill Turkey Production, LLC.

Terry West, Esquire
The West Law Firm
124 West Highland Street
Shawnee, OK 74801
Attorney for Cargill, Inc. and Cargill Turkey Production, LLC

A. Scott McDaniel
Phillip D. Hixon
Nicole Longwell
Martin Allen Brown
Joyce, Paul & McDaniel, P.C.
1717 S. Boulder Ave., Suite 200
Tulsa, OK 74119
Counsel for Peterson Farms, Inc.

Jennifer Stockton Griffin
Lathrop & Gage LC
314 East High Street
Jefferson City, MO 65101
Counsel for Willow Brook Foods, Inc.

Thomas J. Grever
Lathrop & Gage LC
2345 Grand Blvd, Suite 2800
Kansas City, MO 64108-2684
Counsel for Willow Brook Foods, Inc.

Raymond Thomas Lay
Kerr Irvine Rhodes & Ables
201 Robert S. Kerr Avenue, Suite 600
Oklahoma City, OK 73102
Counsel for Willow Brook Farms, Inc.

Jo Nan Allen
219 West Keetoowah
Tahlequah, OK 74464
Counsel for City of Watts, John E. Cotherman and Julie A. Cotherman, Fin and Feather Resort, Inc.

David A. Walls
Walls Walker Harris & Wolfe, PLC
Union Plaza, Suite 500
3030 N.W. Expressway
Oklahoma City, OK 73112-5434
Counsel for Kermit and Katherine Brown

Kenneth E. Wagner
Marcus N. Ratcliff
Laura E. Samuelson
Latham, Stall, Wagner, Steele, & Lehman
1800 South Baltimore, Suite 500
Tulsa, OK 74119
Counsel for Barbara L. Kelley d/b/a Diamond Head Resort

Angela D. Cotner
Attorney at Law
505 Gray Fox Run
Edmond, OK 73003
Counsel for Tumbling T Bar L.L.C.

R. Pope Van Cleef, Jr.
Robertson & Williams
3033 N.W.63rd Street, Suite 200
Oklahoma City, OK 73116
Counsel for Bill Stewart, Individually and d/b/a Dutchman's Cabins

Lloyd E. Cole, Jr.
Attorney at Law
120 West Division Street
Stilwell, OK 74960
Counsel for Illinois River Ranch Property Owners Assoc., Floyd Simmons, Ray Dean Doyle and Donna Doyle, John Stacy d/b/a Big John's Exterminators, Billie D. Howard

Park Medearis
Medearis Law Firm, PLLC
226 West Choctaw
Tahlequah, OK 74464
Counsel for City of Tahlequah

Tim K. Baker
Macie Hamilton Jessie
Tim K. Baker & Associates
303 West Keetoowah
Tahlequah, OK 74464
Counsel for Greenleaf Nursery Co., Inc. and War Eagle Floats, Inc., Peyton Family Trust, Katherine L. and Kevin W. Tye, Tahlequah Livestock Auction

Ron Wright
Wright, Stout, Fite & Wilburn
P.O. Box 707
Muskogee, OK 74402-0707
Counsel for Austin L. Bennett and Leslie A. Bennett, Individually and d/b/a Eagle Bluff Resort

R. Jack Freeman
Tony M. Graham
William Francis Smith
Graham & Freeman
6226 East 101st Street, Suite 300
Tulsa, OK 74137
Counsel for the "Berry Group"

Thomas J. McGeady
Ryan P. Langston
J. Stephen Neas
Bobby J. Coffman
Logan & Lowry, LLP
P.O. Box 558
Vinita, OK 74301
Counsel for Lena and Gamer Garrison and Brazil Creek Minerals, Inc.

Douglas L. Boyd
Attorney at Law
1717 East 15th Street
Tulsa, OK 74104
Counsel for Hoby Ferrell and Greater Tulsa Investments, Inc.

William B. Federman
Jennifer F. Sherrill
Federman & Sherwood
120 North Robinson, Suite 2720
Oklahoma City, OK 73102
Counsel for Intervnors, State of Arkansas and Arkansas Natural Resources Commission

Teresa Marks, Deputy Attorney General
Charles Moulton, Sr. Asst. Attorney General
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Counsel for ANRC and State of Arkansas

Monte W. Strout
Attorney at Law
209 West Keetoowah Street
Tahlequah, OK 74464
Counsel for Louise Squyres d/b/a MX Ranch and Claire Louise Wells d/b/a MX Ranch

Reuben Davis
Boone, Smith, Davis, Hurst & Dickman
500 ONEOK Plaza
100 West Fifth Street
Tulsa, OK 74103
Counsel for Wauhillau Outing Club

Michael Todd Hembree
Hembree & Hembree
17 North 2nd Street
P.O. Box 1353
Stilwell, OK 74960
Counsel for City of Westville

Linda C. Martin
Doerner, Saunders, Daniel & Anderson, LLP
320 South Boston Ave., Suite 500
Tulsa, OK 74103
Counsel for Northland Farms, LLC and Eagle Nursery, LLC

John B. DesBarres
Wilson, Cain & Acquaviva
1717 South Boulder, Suite 801
Tulsa, OK 74119
Counsel for Means, Brian R. Berry and Mary C. Berry, Individually and d/b/a Town Branch Guest Ranch, Billy Simpson, individually and d/b/a Simpson Dairy

Carrie Griffith
Griffith Law Office
114 South Broadway Street
Siloam Springs, AR 72761
Counsel for Raymond C. Anderson and Shannon Anderson

Thomas Janer
Jerry M. Maddux
Selby, Connor, Maddux & Jener
P.O. Box Z
Bartlesville, OK 74005
Counsel for Suzanne M. Zeiders

K. Clark Phipps
Atkinson, Haskins, Nellis
Brittingham, Gladd & Carwile
1500 Parkcentre
525 South Main
Tulsa, OK 74103-4524
Counsel for Hugh and Wanda Dotson

Michael L. Carr
Michelle B. Skeens
Robert E. Applegate
Holden & Carr
200 Reunion Center
Nine East Fourth Street
Tulsa, OK 74103
Counsel for Snake Creek Marina, LLC

and I hereby certify that I have mailed the document by the United States Postal Service to the following non CM/ECF participants:

William H. Narwold
Motley Rice LLC
20 Church Street, 17th Floor
Hartford, CT 06103
Counsel for Plaintiffs

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
Counsel for Plaintiffs

Kenneth D. Spencer
Jane T. Spencer
James C. Geiger
Address Unknown
Pro-Se Third-Party Defendants, Individually and Spencer Ridge Resort

Robin Wofford
Rt. 2, Box 370
Watts, OK 74964
Pro Se Third-Party Defendant

Richard E. Parker
Donna S. Parker
Burnt Cabin Marina & Resort, LLC
34996 South 502 Road
Park Hill, OK 74451
Pro Se Third-Party Defendants

Thomas C. Green
Sidley, Austin Brown & Wood, LLP
1501 K. Street, N.W.
Washington, D.C. 20005-1401
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc.

James R. Lamb
D. Jean Lamb
Route 1, Box 253
Gore, OK 74435
Pro Se Third-Party Defendants, Individually and d/b/a Strayhorn Landing

G. Craig Heffington
20144 W. Sixshooter Road
Cookson, OK 74427
Pro Se Third-Party Defendant, Indivudually, Sixshooter Resort and Marina, Inc.

Marjorie A. Garman
5116 Hwy. 10
Tahlequah, OK 74464
Pro Se Third-Party Defendant, Individually and Riverside RV Resort and Campground,LLC

Doris Mares
32054 S. Hwy. 82
P.O. Box 46
Cookson, OK 74424
Pro Se Third-Party Defendant, Individually and d/b/a Cookson Country Store and Cabins

William and Cherrie House
P.O. Box 1097
Stilwell, OK 74960
Pro Se Third-Party Defendants

John E. and Virginia W. Adair
Family Trust
Route 2, Box 1160
Stilwell, Ok 74960
Pro Se Third-Party Defendant

Eugene Dill
P.O. Box 46
Cookson, OK 74424
Pro Se Third-Party Defendant

Jim R. Bagby
Route 2, Box 1711
Westville, OK 74965
Pro Se Third-Party Defendant

Gordon W. Clinton
Susann Clinton
23605 S. Goodnight Lane
Welling, OK 74471
Pro Se Third-Party Defendants

This the 7th day of August, 2006.

/s/Bruce W. Freeman
Bruce W. Freeman